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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1967
No. 1197

ROY ELDER McKOY AND PATRICIA McKOY, dba BELVOIR RESTAURANT,
Petitioners

vs.

UNITED STATES OF AMERICA BY RAMSEY CLARK, ACTING ATTORNEY GENERAL,
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals for the Fourth Circuit.

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March 1, 1968

PETITION AND APPENDICES FOR PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967
No. ———

ROY ELDER McKOY AND PATRICIA McKOY
dba BELVOIR RESTAURANT,
Petitioners

vs.

UNITED STATES OF AMERICA BY
RAMSEY CLARK, ACTING
ATTORNEY GENERAL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Roy Elder McKoy and Patricia McKoy, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on December 4, 1967.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is unreported and is printed in Appendix A hereto, infra page A1. The judgment of the Circuit Court of Appeals is printed in Appendix A hereto, infra, page A3. The oral opinion and judgment of the United States Court for the Eastern District of Virginia, of April 28, 1967, is printed in Appendix A hereto, infra, page A4. The injunction order of the United States Court for the Eastern District of Virginia, of January 27, 1967, is printed in Appendix A hereto, infra, page A14.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on December 4, 1967, (infra, Appendix A, page A3). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. WHETHER TITLE II OF THE CIVIL RIGHTS ACT OF 1964 IS A VALID EXERCISE OF CONGRESSIONAL POWER TO "REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND WITH THE INDIAN TRIBES" AS APPLIED TO THE PETITIONERS' OPERATION OF BELVOIR RESTAURANT?

2. WHETHER THE APPLICATION OF SAID TITLE II OF THE SAID ACT TO THE PETITIONERS CREATED STATUTORY RIGHTS IN OTHERS SUPERIOR TO THE PETITIONERS' CONSTITUTIONAL RIGHTS PROTECTED BY THE BILL OF RIGHTS?

3. WHETHER THE CONGRESSIONAL POWERS TO REGULATE COMMERCE IN THE BODY OF THE UNITED STATES CONSTITUTION IS LIMITED BY THE FIRST TEN AMENDMENTS TO THE CONSTITUTION?

4. WHETHER THE APPLICATION OF THE SAID TITLE II OF THE SAID ACT TO THE PETITIONERS VIOLATES THEIR FREEDOM OF RELIGION, FREEDOM OF SPEECH, AND FREEDOM OF ASSOCIATION AND FREEDOM OF NON-ASSOCIATION AS GUARANTEED UNDER THE FIRST AMENDMENT?

5. WHETHER THE APPLICATION OF THE SAID TITLE II OF SAID ACT TO THE PETITIONERS VIOLATES THEIR RIGHT NOT TO BE "DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW," OR THEIR RIGHT NOT TO HAVE THEIR "PRIVATE PROPERTY TAKEN" FOR PRIVATE OR "FOR PUBLIC USE WITHOUT JUST COMPENSATION" AS GUARANTEED UNDER THE FIFTH AMENDMENT?

6. WHETHER THE APPLICATION OF THE SAID TITLE II OF THE SAID ACT TO THE PETITIONERS VIOLATES THEIR RIGHT TO TRIAL BY JURY AS GUARANTEED UNDER THE SIXTH AND SEVENTH AMENDMENTS?

7. WHETHER THE APPLICATION OF THE SAID TITLE II OF THE SAID ACT TO THE PETITIONERS VIOLATES THIER RIGHT TO EXERCISE PRIVATE CONSTITUTIONAL RIGHTS AND BELIEFS OF RACIAL SEGREGATION AS THEY CHOOSE, SO LONG AS SUCH EXERCISE DOES NOT VIOLATE THE RIGHTS OF OTHERS, AS GUARANTEED UNDER THE NINTH AMENDMENT?

8. WHETHER THE APPLICATION OF THE SAID TITLE II OF THE SAID ACT TO THE PETITIONERS VIOLATES THE RIGHT AND POWER RESERVED TO THEM TO ESTABLISH THEIR OWN PERSONAL RACIAL POLICY IN THE OPERATION OF THEIR PRIVATE BUSINESS, THE BELVOIR RESTAURANT, AS GUARANTEED UNDER THE TENTH AMENDMENT?

9. WHETHER THE APPLICATION OF THE SAID TITLE II OF THE SAID ACT TO THE PETITIONERS VIOLATES THEIR FREEDOM FROM INVOL-

UNTARY SERVITUDE GUARANTEED UNDER THE THIRTEENTH AMENDMENT?

10. WHETHER THE CONGRESS OF THE UNITED STATES CAN ESTABLISH A GOVERNMENTAL RACIAL POLICY OF "FORCED INTEGRATION" ANY MORE CONSTITUTIONALLY VALID THAN A GOVERNMENTAL RACIAL POLICY OF "FORCED SEGREGATION?"

11. WHETHER THE PERMANENT INJUNCTION ORDER ENTERED AGAINST THE PETITIONERS IN THIS CASE ON JANUARY 27, 1967, SHOULD BE DECLARED VOID BECAUSE OF LACK OF CONSTITUTIONALITY?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitutional provisions involved are as stated below and are printed in Appendix B hereto, infra, as indicated:

The "commerce" clause, Article I, Section 8, of the U. S. Constitution is printed in Appendix B hereto, infra, page B1.

The "trial by jury" clause of Article III, Section 2, of the U. S. Constitution is printed in Appendix B hereto, infra, page B1.

The First Amendment to the U. S. Constitution is printed in Appendix B hereto, infra, page B1.

The "due process" and "just compensation" clauses of the Fifth Amendment to the U. S. Constitution are printed in Appendix B hereto, infra, page B1.

The Sixth Amendment to the U. S. Constitution is printed in Appendix B hereto, infra, page B2.

The Seventh Amendment to the U. S. Constitution is printed in Appendix B hereto, infra, page B2.

The Ninth Amendment to the U. S. Constitution is printed in Appendix B hereto, infra, page B2.

The Tenth Amendment to the U. S. Constitution is printed in Appendix B hereto, infra, page B2.

Section 1. of the Thirteenth Amendment to the U. S. Constitution is printed in Appendix B hereto, infra, page B3.

2. The Statutes involved are as stated below and are printed, in pertinent part, in Appendix B hereto, infra, as indicated:

Title 42 U.S.C.A. § 2000 a., Public Law 88-352, Title II, § 201, July 2, 1964, 78 Stat. 243, is printed in pertinent part, in Appendix B hereto, infra, page B3.

Title 42 U.S.C.A. 2000 a-2, Public Law 88-352, Title II, § 203, July 2, 1964, 78 Stat. 244, is printed in Appendix B hereto, infra, page B4.

Title 42 U.S.C.A. 2000 a-5, Public Law 88-352, Title II, § 206, July 2, 1964, 78 Stat. 245, is printed, in pertinent part, in Appendix B hereto, infra, page B5.

Title 42 U.S.C.A. 2000 a-6, Public Law 88-352, Title II, § 207, July 2, 1964, 78 Stat. 245, is printed in Appendix B hereto, infra, page B5.

Title 42 U.S.C.A. 2000 h, Public Law 88-352, Title XI, § 1101, July 2, 1964, 78 Stat. 268, is printed in Appendix B hereto, infra, page B6.

STATEMENT

The Petitioners, Roy Elder McKoy and Patricia McKoy, his wife, operated Belvoir Restaurant, Marshall, Virginia, on a white-only basis from the time they opened it, a considerable time before the passage of the Civil Rights Act of 1964, until April 28, 1967. However, the McKoys have served travelers from within and without Virginia during this period without distinction.

The Belvoir Restaurant is located at the intersection of Virginia State Routes numbered 55 and 709 which is known as Belvoir, Virginia. Route 709 is a secondary road in the Virginia road system and Route 55 is a Virginia primary road, as is shown on Petitioners' Exhibit No. 9, which feeds into Interstate Highway 66, but is not itself a U. S. Route or a part of the Interstate Highway System.

The McKoy home and the Belvoir Restaurant are under the same roof and have been that way ever since they opened the place for business some time prior to the passage of the Civil Rights Act of 1964. The living space is approximately twenty-five (25) by thirty-eight (38) feet and the restaurant dining room and counter area is approximately twenty-four (24) by thirty-eight (38) feet with a kitchen on the back which is used for cooking for the restaurant as well as for the McKoys and their four children, as shown on Petitioners' Exhibit No. 1. The restaurant dining and counter area has a seating capacity of approximately thirty-eight (38) to forty-five (45) persons depending on size of persons and seating arrangement.

The McKoys operate the Belvoir Restaurant as a family business with no other employees either in the restaurant or in the home. Roy McKoy buys and cooks the food. Mrs. McKoy does the serving and they both do the cleaning up.

The McKoys did not advertise their restaurant any place

other than on the premises as shown in Petitioners' Exhibits Nos. 2 through 6, inclusive, except in the yellow pages of the small telephone book used in that area of northern Virginia covering the local area of Bluemont, Calverton, Hamilton, Hillsboro, Leesburg, Lovettsville, Marshall, Middleburg, Purcellville, Remington, the Plains, Upperville Warrenton and Waterford. The advertisement from the telephone book is shown in Petitioners' Exhibit No. 7.

During 1966 the McKoy's gross receipts in the operation of the restaurant were $24,195.56, of which $13,624.17 was spent for food and supplies for the restaurant during the year. Mrs. McKoy testified that she estimated they served maybe 100 customers a day on a rough average. Mr. McKoy testified that he estimated that 3% of these customers are from out of Virginia and that he knows the rest. Mr. Schwelb, a government witness, testified that when he stopped at the restaurant on Sunday, October 16, 1966, for a cup of coffee, he observed seven automobiles, other than his own which was from the District of Columbia and that five of them bore out-of-state license plates and that on the same Sunday he observed 100 automobiles travelling east on Highway 55 by the Belvoir Restaurant and that forty-nine had non-Virginia license plates.

On Saturday morning of June 12, 1965, (more than a year and a half before the injunction order, unless it should be 1966) Mr. Joseph Theofield Flakne, a retired former Special Assistant to the High Commissioner of the Pacific Islands (Micronesia), in the company of Mr. Bailey Olter of Ponape, Caroline Islands, who was at that time Assistant District Administrator of the Ponape District, stopped at the Belvoir Restaurant to have coffee and some refreshment. Mr. Flakne had previously been there on several occasions and gotten good food and service and had recommended it to others. But this time Mrs. McKoy refused to serve them stating, "We do not serve dark skinned people," and still refused

to do so even after Mr. Flakne explained that Mr. Olter was not a Negro. Mr. Flakne was severely shocked by this action and has not gone to the restaurant again.

The United States brought the case in the first instance in the United States Court for the Eastern District of Virginia, at Alexandria, Virginia, on October 17, 1966, pursuant to Title 42 U.S.C.A. § § 2000 a-5 and 2000 a-6, to restrain the Petitioners from operating the Belvoir Restaurant on a racially discriminatory basis.

On January 27, 1967, the Court of the first instance entered an order permanently enjoining each of the Petitioners from operating the Belvoir Restaurant on a racially discriminatory basis. The order was entered on Mr. Flakne's testimony and other evidence showing that the McKoys had stated without equivocation that they had a policy of operating the Belvoir Restaurant on a segregated basis, but no other showing of actual refusal to serve Negroes. At that time the McKoys had made no answer to the complaint against them other than a letter to the United States Attorney by Roy McKoy where he stated in part,

> "While reading the provisions enclosed in the summons, I failed to see any act that says we must forfeit our freedom to become white slaves to the Federal government or any other organization just because I am an individual private business man.
>
> I have in the past and will in the future continue to conduct my business as I see fit according to the locationn (sic) and conditions." (R. 5)

On March 9, 1967, the Petitioners refused to serve the Negroes and the Caucasians with them who appeared at their restaurant together.

On April 3, 1967, the United States, Respondent herein,

applied for an order requiring the Petitioners to show why they should not be held in civil contempt of the January 27, 1967, permanent injunction. On April 5, 1967, the Court in the first instance entered such an order and set the hearing for April 12, 1967.

On April 12, 1967, the Petitioners, through counsel, on their first actual appearance in the matter, requested a continuance of the hearing. The Court granted a continuance to April 28, 1967.

On April 25, 1967, Petitioners filed a motion for relief from the permanent injunction of January 27, 1967, on application and constitutional grounds, and to stay the contempt proceeding pending the disposition of the motion for relief all returnable April 28, 1967. (R. 131-134).

On April 28, 1967, the Petitioners made it clear in their testimony that they do not believe in inter-racial mixing and particularly do not believe in it taking place on their restaurant property and do not believe that the government can properly require them to permit it and that is the reason they refuse to serve Negroes or the Whites who come in with Negroes on their property.

After hearing the evidence on the McKoys' conduct of their business and the argument for relief on Constitutional grounds, on April 28, 1967, the Court in the first instance denied Petitioners' motion for relief from the order of January 27, 1967, held the Petitioners to be in civil contempt of said order, delayed any imposition of sentence or fine in the case of Petitioner Mrs. Patricia McKoy for sixty (60) days and sentenced the Petitioner Roy Elder McKoy to sixty (60) days confinement.

On May 1, 1967, the Petitioners appeared before the Court of the first instance and purged themselves of contempt

of Court and Roy Elder McKoy was released from confinement.

On appeal to the United States Circuit Court for the Fourth Circuit, in its Opinion and Judgment of December 4, 1967, the Court of Appeals affirmed the judgment of the District Court. Hence this petition for certiorari and relief from the January 27, 1967, injunction order.

REASONS FOR GRANTING THIS WRIT

1. The Petitioners believe that since the Fourth Circuit Court of Appeals and the District Court below have said that they are bound by the decisions of this Court in *Atlanta Motel* v. *United States*, 379 U.S. 241, 13 L ed 2d 258, 85 S. Ct. 348 (1964) and *Katzenbach* v. *McClung*, 379 U.S. 294, 13 L ed 2d 290, 85 S. Ct. 377 (1964), upholding the constitutionality of Title II of the Civil Rights Act of 1964, this Court, in effect, becomes the Court of original jurisdiction with respect to considering attacks on the constitutionality of the various provisions of Title II and Title XI of the Civil Rights Act of 1964, not attacked in the two cases above and to attacks on the Acts' constitutionality under other amendments to the Constitution and questions not raised or settled in the *Atlanta Motel* and *McClung* cases cited above. For this reason the Petitioners believe that the writ of certiorari should be granted and that the matters raised by the Petitioners that were not raised by the two cited cases should be considered by this Court under the rationale of *United States* v. *Robel*, — U.S. —, 19 L ed 2d 508, 88 S. Ct. — (1967), holding that, in considering the constitutionality of § 5 (a) (1) (D) of the Subversive Activities Control Act being attacked under the First Amendment, this Court was not bound by the *Aptheker* case (*Aptheker* v. *Secretary of State*, 378 U.S. 500, 12 L ed 2d 992, 84 S. Ct. 1659 (1964)),

which ~~was~~ held § 6 of the Subversive Activities Control Act unconstitutional when attacked under the Fifth Amendment. Thus the granting of this writ of certiorari will provide the opportunity to this Court to decide important questions of federal law presented by the Petitioners' questions under the First, Sixth, Seventh, Ninth, Tenth and Thirteenth Amendments to the U. S. Constitution which have not been, but should be, settled by this Court because the lower Courts say they cannot decide them and reconsider those deemed appropriate by this court in light of the differences between the Petitioners' business and those considered in *Atlanta Motel* and *McClung,* supra.

2. By granting the writ and settling all the questions raised by the Petitioners after proper briefing, this Court will provide guidance to the people in the conduct of their affairs and to the Congress of the United States in the event the Civil Rights Act of 1964 needs amending to eliminate constitutional objection and still be enforceable.

3. Even by granting the writ and the final relief prayed for by the Petitioners the Court will not be supporting or condoning racial segregation just because it recognizes the right of individuals to practice it. It cannot fairly be said that the Court supported or condoned the Atheisn of William Murray In *Abington School District* v. *Schempp,* 374 U.S. 203, 10 L ed 2d 844, 83 S. Ct. 1560 (1963), or the communism of Aptheker and Robel in *Aptheker* v. *Secretary of State,* 378 U.S. 500, 12 L ed 2d 992, 84 S. Ct. 1659 (1964) and *United States* v. *Robel,* — U.S. —, 19 L ed 2d 508, 88 S. Ct. — (1967), respectively, just because it recognized the right of individuals to exercise their rights. So it would be in this case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1, 1968

Appendices

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,650.

United States of America by Ramsey Clark
Acting Attorney General,
Appellee,

versus

Roy Elder McKoy and Patricia McKoy d/b/a Belvoir Restaurant,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued November 7, 1967. Decided December 4, 1967.)
Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

Frank M. McCann for Appellants, and Monica Gallagher, Attorney, Department of Justice, (John Doar, Assistant Attorney General, Frank E. Schwelb and Alvin Hirshen, Attorneys, Department of Justice, on brief) for Appellee.

PER CURIAM:

The appellants, the operators of a restaurant, attack the constitutionality of Title II of the Civil Rights Act of 1964 under the First, Fifth, Sixth, Ninth, Tenth and Thirteenth Amendments to the Constitution of the United States. Atlanta Motel v. United States, 379 U.S. 241 and Katzenbach v. McClung, 379 U.S. 294, they say, did not dispose of the grounds of attack advanced here.

Those decisions of the Supreme Court, generally upholding the constitutionality of the Act, are binding upon this subordinate court, however. We are not at liberty to consider the novel contentions made here, however interesting they might be academically, for, whether or not they were asserted in the Supreme Court, the definitive decisions of that court control the result here.

Affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,650.

United States of America by Ramsey Clark,
Acting Attorney General,

Appellee,

vs.

Roy Elder McKoy and Patricia McKoy
d/b/a Belvoir Restaurant,

Appellants.

Appeal from *the United States District Court* for the .....Eastern.....*District of*.....Virginia.

This cause *came on to be heard on the record from the United States District Court for the*.....Eastern..... *District of*.....Virginia....., *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* affirmed.

/S/ CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

FILED

Dec. 4, 1967
Margaret L. Davis,
Chief Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA, VIRGINIA

CIVIL ACTION NO. 4251

UNITED STATES OF AMERICA
by RAMSEY CLARK
Acting Attorney General
Plaintiff,

v.

ROY ELDER McKOY and PATRICIA McKOY,
dba BELVOIR RESTAURANT
Defendants.

ORAL OPINION AND JUDGMENT OF COURT.

(Transcript 236-248, April 28, 1967)

THE COURT: All right. Thank you.

Your several motions are all denied. Your motions questioning the constitutionality of Title II of 1964 are plainly frivolous. They have all been passed upon, clearly ruled upon, by no less an authority than the United States Supreme Court itself. This act was passed by Congress. The Supreme Court of the United States held the section to be constitutional.

The only factual question remaining before the Court is a determination of whether or not Mr. McKoy's restaurant, first, falls within the category under Sub-Chapter— as defined under Sub-Chapter (2), Public Accommodations, known 2000 (a of the United States Code).

The Court finds as a fact that his restaurant is a restaurant as defined in Paragraph (2), sub-section (b) of that act. The Court finds as a matter of fact that Mr. McKoy's restaurant both serves and offers to serve interstate travelers. The Court further finds that a substantial portion of the food that he serves has moved in commerce. The Court finds that it is a public restaurant; it is open for business. The Court further finds that he has advertised voluntarily in the classified section of the telephone directory covering not only his town, but all of that general portion of Northern Virginia up to as far as Purcellville in Loudoun County, and up through there, holding himself out to the public in the same manner as all other restaurants serving meals.

He admits, very freely and honestly, that certainly, up to this time, outside of disorderly persons, outside of people who might have been fighting in his restaurant, outside of people who may have gotten a little boisterous or drunk, on rare occasions, he served anybody that came along, with the exception of colored people.

As far as this record shows, prior to the time when the so-called 15 mixed group came up there on the Sunday evening in question,—I believe that was early in January— there is not any evidence whether he ever refused or had an opportunity to refuse to serve a colored person because there is not any evidence whether anyone was there, I mean prior to that time, prior to the issuance of the injunction, there just isn't—

MR. SCHWELB: February 12, Your Honor. The injunction was January 22.

THE COURT: It was early—I mean prior to that. There is not any evidence of previous years what his practice was. There is not any evidence.

MR. SCHWELB: You mean before the injunction, Your Honor, or after?

THE COURT: Before.

MR. SCHWELB: There was Mr. Flakne, of course.

THE COURT: Outside of that one case, prior to that there is not any evidence of what he did.

MR. SCHWELB: There was evidence as to his policy.

THE COURT: There is not any evidence, even as to that, as far as the record is concerned. After the injunction was entered, when there was prima facie evidence that he refused to serve a person on account of their race or color, the evidence is clear that that injunction was served on both he and his wife. They both freely admitted on the stand here that they received it; they, generally speaking understood the content of it and the nature of it, and I will give them both credit for the courage of their convictions because they not only wrote the Court beforehand, which the Court ignored, and told me they were not about to pay any attention to it, because they did not think it was right. They even today, after I continued it and gave them a hearing, they freely admit they did not serve those 15 people, and there may have been some disturbance there; at least, the Court found them to be busybodies. The second case, which is the one this Show Cause Order is on, there is not a scintilla of evidence that those persons, other than being three of the same ones, I think, three of four,—

MR. SCHWELB: None of the same.

THE COURT: He said they were the same. There is not any evidence to the contrary. Whether they were or were not, three or four of the same people is what he said, he recognized some of them. He freely admits that he did not serve them, that he did not intend to serve them, and he would not serve them; he would not serve either the white or colored because he would not serve a white man that was with a colored person, and he would not serve a white man he knew was with a colored person or had been, apparently. He has made it very clear, also, that he does not think, factually,—And the Court finds, after it was explained to both of these defendants, and it was particularly explained to Mr. McKoy in the simplest language that this Court knows how to use so that he could clearly understand it, that this law requiring him, so long as he maintains a public restaurant, a restaurant of the type and kind he is now operating there, that he is required by law to serve any and all persons who offer themselves for use of his accommodations, so long as they come in in an orderly manner and not boisterous or disturbing the peace and are not intoxicated is what I mean by "an orderly manner"— He made it very clear to the Court that he did not think Congress had any right to pass such a law. Well, maybe he is right, that they did not have that right. The Supreme Court of the United States said they did have the right to pass it, and it has squarely held that the Congress did have the right to pass the very act which he says they did not have the right to pass.

I explained that to him, and I said, "Under those circumstances, are you willing to comply with the law?" And he says he is not. He says he does not have any intention of doing it. His wife says the same thing, she will not do it.

And the Court finds as a fact that he is sincere in that statement, that he does not intend to do it. Counsel attempted very adroitly to get from the defendant McKoy

that his real objection to this present procedure was his conscientious and sincere desire to have this law tested by the Supreme Court, that is, the constitutionality of it. Frankly, he did not agree with his counsel. Of course, he allowed his counsel to file these proceedings. I do not mean that he did not. But, as adroitly as counsel tried to get him to testify to that, he just did not do it.

It is clear to the Court, and the Court so finds, that he is not sincerely questioning the constitutionality of this case, he is not sincerely trying to have it a test case; he does not intend to comply with this law if, after tested, it would be adverse to his belief. He says that, honestly and frankly, he does not intend to do it. It does not make any difference what the Supreme Court says the second time. The Court finds that he said that; the Court finds that he meant that.

Mrs. McKoy did not say it. I am satisfied that if she were asked, she would say it, because she just said—she was not asked specifically what she would do if the Supreme Court, the second time, said it was constitutional and she had to obey it, but there is no doubt in the Court's mind as to what she would say.

This Court gave everybody an opportunity to, what I call, get their feet on the ground by having a little recess. They do not want to get their feet on the ground. We have a lot of people in this world who want to do things. They have a right to do that. They stand on what they call principle, over what somebody else says the law is. I cannot hate them for that. I have no personal feelings, but I have a duty to perform. I cannot let someone wilfully and deliberately tell me, and not only violate the injunction of this Court, but, very frankly and honestly—and I admire them for that—tell me they do not intend to comply with it.

The Court finds as a matter of fact that Mr. McKoy is and has wilfully violated the injunction of this Court, duly

and properly served on him, that is the 27th injunction. The Court further finds that he does not have any intention whatsoever of complying with that injunction if it requires him to serve anyone, including colored people who might come into his restaurant in the ordinary course of business.

The Court finds that Mrs. McKoy, Mrs. Patricia McKoy, is in contempt of this Court, in wilful contempt of this Court, by acting in concert with him in refusing to abide, wilfully refusing, wilfully, deliberately and intentionally refusing to abide by the Order of this Court, namely, complying with the injunction issued pursuant to the Civil Rights Act of 1964. The Court further finds that Mrs. Patricia McKoy deliberately, or wilfully and knowingly, indicated that she was not going to comply with it. She did not say, and she was not asked whether she was questioning the sufficiently of the findings, or, I mean, as far as her situation. She is a party defendant, no question about that, and whether she was—but I am sure that she would say the same thing, but it is moot, I do not have to find that now.

There is a law, Mr. McKoy, and I am telling you for your benefit, nobody else's—I don't expect you to agree with me—I have had the unfortunate duty, really it is a duty, a hard duty on my part to send young men in the prime of their life to the Penitentiary of the United States because they conscientiously objected to entering the Military Service after they were directed to enter it. I had not the slightest doubt in my mind that they were conscientious objectors. I had not the slightest doubt in my mind that these young men that I had to send to the penitentiary had firm, fixed—many of them—religious beliefs that it was wrong to kill anything or anybody. But, again, I did not write that law. The Congress of the United States made the draft laws, and the Supreme Court of the United States has said they are constitutional. I thought it was wrong to the families and to the individuals for these boys

to spend three of four years in the penitentiary in lieu of spending the same time in the Service, particularly when many of them could have had non-combatant service, or had civilian service in lieu of military—essential civilian service. They elected to not take it. I admire them for one thing, because a man has to be a man of strong principles. I will equally recognize your principles. I recognize you have a right to think what you want to. I recognize you have the right to say what you want to.

This is a country of laws, and you have to obey them. You have told me that you do not intend—After I found that you do not intend to obey the law, you have not shown the slightest intent to purge yourself of the contempt of this Court.

In the case of Roy Elder McKoy, upon the findings just made, it is the judgment of the Court that he is in wilful contempt of this Court and that he be confined for a period of 60 days, or until such time as he voluntarily comes before this Court and publicly assures the Court that he is willing to purge, wants to purge himself of the contempt by stating that so long as he remains in that business at that location he will comply with the law.

Mr. Marshal, he is in your custody.

THE MARSHAL: Mr. McKoy, step this way, please.

THE COURT: Wait a minute. Wait until I finish. Wait a minute.

In the case of Mrs. McKoy, the Court finds her in contempt of this Court on the findings heretofore stated, and I have really no choice, hardly have a choice, but to put her in jail because she is almost equally as wilful, but, nevertheless, in view of the family situation, in view of the

restaurant up there, in view of their property rights, even though, since they both wrote the letter that they think they cannot get justice in this Court, they cannot get a fair hearing, notwithstanding all of that statement on their part, I am going to temper justice with mercy as far as she is concerned, and I am going to defer any imposition of sentence or fine in her case for a period of 60 days so that she can return up to home tonight, both to take care of the children and to do whatever she can with the restaurant. But I want it very clear, Mrs. McKoy, very very clear, and I do not mean for any of these people to come up there in the guise of self-made policemen, or whatever they want to call themselves, whether they are embryonic lawyers or law students or anything else. I have not the slightest idea of calling upon them. If the United States Government cannot take care of their problems, we do not need what I still term as busybodies to make more trouble for people. So I do not expect you to go up there and start trouble, and if any of you do go up there and start trouble, and this Court can do anything about it, anybody brings it to this Court's attention officially, if any of you have any idea this Court will not mete out identically the same, if I have the power to do it, that I have just meted out to Mr. McKoy, all you've got to do is test me and you will soon find out.

Mrs. McKoy, I am making it very clear, you do not have to open that restaurant, you do not have to open it tomorrow. I do not expect any of these people to come up there and test you, but if anybody in the normal course of business, comes through there and he acts like a lady or a gentleman, it does not make any difference whether he is white, colored, yellow, Indian, or any other color, if he is normal, you are expected and required under the law to give him the same service you would give to Mr. McCann if he came in your restaurant. If you do not intend to do that, I will give you some free advice. You would be better advised to close your restaurant. I am not ordering you to

close your restaurant. So you understand it, I am doing that so we do not break this family up.

I. am perfectly willing to entertain a motion—not now, because I will not entertain one—but I will entertain one later, after a reasonable length of time, either on his own or on conferences with his wife, or upon advice of counsel, if he wants to come in here and purge himself of the contempt, I will be glad to entertain the motion, because I can reduce this 60 days anytime I am inclined to.

I further want to make it very clear, Mr. McKoy, so there will not be any misunderstanding on your part, if, at the end of the 60 days, you decide to serve the 60 days and you think that from then on you can run your restaurant the way you want to, you can serve who you want to, you do not have to comply with the law, you've made mistake number 2, because if any proper complaint is filed against you—and I will be the judge of whether it is a proper complaint or not—or if, even then, at the end of 60 days you do not assure the Court in open court that you do intend to the best of your ability to comply with the law, I will resentence you for another 60 days until you decide to do it. That might go on ad infinitum.

Mr. Marshal, he is in your custody.

MR. McCANN: May I be heard, Your Honor?

THE COURT: Yes, sir.

MR. McCANN: The defense, of course, objects—

THE MARSHAL: Step forward, please.

MR. McCANN: —objects and wishes to note the objection for the record, and would also like to ask Your Honor if you would grant a stay of execution pending application for an appeal.

THE COURT: Motion is denied. If you are making a motion for a stay, he is in wilful, deliberate contempt of this Court, the motion is denied. Now, that does not prohibit you, since I am not absolutely certain that you know all of the rules—you ought to—being here, I will tell you that there is a Court of Appeals and there are members of the Supreme Court of the United States not too far from here. I am not going to rule whether any of them, individually or collectively, can let Mr. McKoy out on bond. I am not going to express an opinion on it. But if he is let out before this 60 days is up and, as I say, then until he decides to comply with the law, I want to be nice with him, I want to help him, I could not think of anybody that is harming himself more, but I think you are not—I am not going to express any opinion as to how you should advise him—he selected you and that is his business.

Motion is denied for a stay. If you are making a motion for bond, that is likewise denied.

MR. McCANN: That was the next—

THE COURT: It is denied. It is without prejudice to your right to go to anybody you want to that is higher than I am to ask for anything that you want to. It is without prejudice, and I will tell you, as far as I am concerned, you have the right to go to any member of the Court of Appeals or any member of the Supreme Court. I do not think any other judge, other than those two categories, can do anything about it. I am not saying they will or will not, and I am not asking you to go see them, but I am telling you there is no prohibition keeping you from doing it.

MR. McCANN: The defense excepts—

THE COURT: What?

MR. McCANN: The defense excepts to the ruling of the Court.

THE COURT: All right.

ORDER

It appearing that the Complaint in this action was duly served on each of the defendants on October 19, 1966; and the defendant Roy Elder McKoy having responded to the Complaint by letter to the United States Attorney dated November 1, 1966, in which letter none of the allegations of the Complaint was denied; and the plaintiff having made a motion for judgment in accordance with the prayer of the Complaint, said motion being returnable on January 27, 1967; and each of the defendants having been personally served by the Deputy United States Marshal with notice of said motion, and with said motion, and with the plaintiff's proposed Order herein; and counsel for plaintiff having again notified defendants, by letter dated January 18, 1967, of the hearing scheduled for January 27, 1967; and the defendants having failed to appear at said hearing; and the Court having read and filed plaintiff's motion and the attachments thereto, and the affidavits of JOSEPH T. FLAKNE and FRANK E. SCHWELB in support thereof; and the Court having heard the testimony adduced on behalf of plaintiff, and being of the opinion that plaintiff is entitled to a permanent injunction as prayed in the Complaint, NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED, as follows:

1. That the defendants, Roy Elder McKoy and Patricia McKoy, their agents, employees and successors, and all persons in active concert or participation with them, be and they are hereby permanently enjoined from:

(a) Refusing to admit nonwhite persons to the premises of the Belvoir Restaurant upon the same basis and under the same conditions as other members of the general public are admitted to said establishment;

(b) Failing or refusing to sell food or to provide service to nonwhite patrons of the Belvoir Restaurant upon the same basis and in the same manner as food and services are made available to other members of the general public;

(c) Otherwise failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of the Belvoir Restaurant available to nonwhite persons upon the same basis as they are made available to other members of the general public; and

(d) Engaging in any act or practice which, directly or indirectly, deprives any person of the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of the Belvoir Restaurant without discrimination or segregation on the ground of race or color.

2. That the plaintiff recover of the defendants its costs herein.

3. That the United States Marshal forthwith make personal service of a certified copy of this Order on each of the defendants herein and duly file his Return of Service with the Clerk of the Court.

ORDERED this 27 day of January, 1967.

/s/ OREN R. LEWIS

United States District Judge

APPENDIX B

Constitutional Provisions Involved:

Article I, Section 8, of the U. S. Constitution provides, in part, as follows:

> "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; ***"

Article III, Section 2, of the U. S. Constitution provides, in part as follows:

****

> "The trial of all crimes, except in cases of impeachment, shall be by jury; . . ."

The First Amendment to the U. S. Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment to the U. S. Constitution in pertinent part, reads as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the U. S. Constitution reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Seventh Amendment to the U. S. Constitution reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The Ninth Amendment to the U. S. Constitution reads as follows:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to the U. S. Constitution reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Section 1. of the Thirteenth Amendment to the U. S. Constitution reads as follows:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Statutes Involved:

Title 42 U.S.C.A. 2000 a, in pertinent part, reads as follows:

> "Section 2000 a. PROHIBITION AGAINST DISCRIMINATION OR SEGREGATION IN PLACES OF PUBLIC ACCOMMODATION - EQUAL ACCESS
>
> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> ****
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> ****

(c) The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the good which it serves, or gasoline or other products which it sells, has moved in commerce; . . . For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country"

****

Title 42 U.S.C.A. § 2000 a-2, provides:

"Section 2000 a-2. PROHIBITION AGAINST DEPRIVATION OF, INTERFERENCE WITH, AND PUNISHMENT FOR EXERCISING RIGHTS AND PRIVELEGES SECURED BY SECTION 2000 a or 2000 a-1 OF THIS TITLE

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000 a or 2000 a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000 a or 2000 a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000 a or 2000 a-1 of this title.

Title 42 U.S.C.A. § 2000 a-5 (a) provides:

"SECTION 2000 a-5 CIVIL ACTIONS BY THE ATTORNEY GENERAL - COMPLAINT

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein, described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

****

Title 42 U.S.C.A. § 2000 a-6 provides:

"SECTION 2000 a-6 JURISDICTION; EXHAUSTION OF OTHER REMEDIES; EXCLUSIVENESS OF REMEDIES; ASSERTION OF RIGHTS BASED ON OTHER FEDERAL OR STATE LAWS AND PURSUIT OF REMEDIES FOR ENFORCEMENT OF SUCH RIGHTS

(a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to

whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Title 42 U.S.C.A. § 2000 h provides:

"SECTION 2000 h. CRIMINAL CONTEMPT PROCEEDINGS: TRIAL BY JURY, CRIMINAL PRACTICE, PENALTIES, EXCEPTIONS, INTENT; CIVIL CONTEMPT PROCEEDINGS.

In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000.00 or imprisoned for more than six months.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to writs, orders, or process of the court. No person shall be convicted of criminal contempt hereunder unless the act or omission constituting such

contempt shall have been intentional, as required in other cases of criminal contempt.

Nor shall anything herein be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

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No. 1197

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROY ELDER MCKOY AND PATRICIA MCKOY,
dba BELVOIR RESTAURANT, PETITIONERS

v.

UNITED STATES OF AMERICA BY RAMSEY CLARK,
ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
STEPHEN J. POLLAK,
Assistant Attorney General,
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek a determination that Title II of the Civil Rights Act of 1964 violates the First, Fifth, Sixth, Seventh, Ninth, Tenth and Thirteenth Amendments to the Constitution. Their contentions are plainly insubstantial.

1. On October 17, 1966, the United States instituted this action, pursuant to Section 206(a) of Title II of the Civil Rights Act of 1964,[1] to enjoin petitioners from discriminating against Negroes in the operation of the Belvoir Restaurant, which they own and operate. Petitioners filed no answer to the com-

[1] 42 U.S.C. 2000a-5(a).

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plaint, but submitted a letter to the United States Attorney insisting that they would "continue to conduct [their] business as [they] see fit * * *" (Pet. 8). After a hearing on January 27, 1967,[2] the district court entered a permanent injunction against petitioners, enjoining them from engaging in racial discrimination (Pet. App. A14–A15; 12 Race Rel. L. Rep. 1030). On January 28, 1967, a certified copy of the order was personally served on petitioners. No appeal was taken from this injunction.

On March 9, 1967, three students—two Negroes and one white—were refused service at the Belvoir Restaurant, and the United States instituted civil contempt proceedings. At the hearing held on this motion on April 28, 1967, petitioners appeared and were represented by counsel. Petitioners sought relief from the permanent injunction, principally on the ground that it was based upon an allegedly unconstitutional statute. Terming this assertion "plainly frivolous" (Pet. App. A4) in light of this Court's decisions sustaining Title II, the district court denied the motion to set aside the injunction, found both petitioners in contempt, and ordered Mr. McKoy imprisoned for sixty days or until he purged himself by stating his intention to comply with the injunction. After spending the weekend in confinement, Mr. McKoy purged himself of contempt on May 1, 1967, by agreeing to serve all persons without discrimination. Petitioners then appealed the district court's

[2] Petitioners had personal notice of the hearing but did not appear.

refusal to dissolve the permanent injunction, and on December 4, 1967, the Court of Appeals for the Fourth Circuit affirmed *per curiam,* 387 F. 2d 144 (Pet. App. A1–A2).

2. Petitioners urge that Title II of the Civil Rights Act (42 U.S.C. 2000a—2000a–6) violates the United States Constitution. As they recognize, however (Pet. 10), this Court upheld the constitutionality of Title II in *Atlanta Motel* v. *United States,* 379 U.S. 241, and *Katzenbach* v. *McClung,* 379 U.S. 294. In *Atlanta Motel,* the Court expressly rejected Fifth and Thirteenth Amendment claims (379 U.S. at 258–261), and of course the determination that the Act is a valid exercise of the Commerce Power necessarily refutes any defense based on the Ninth or Tenth Amendment. Petitioners offer no reason why this Court should now reconsider these unanimous holdings.

Petitioners' First Amendent claim, apparently resting on a "freedom of non-association" (Pet. 2, Quest. 4), ignores the fact that even at common law one who undertook to become an innkeeper obliged himself to serve all orderly patrons. Title II merely provides federal protection for this right to public accommodations.

The assertion of a right to a jury trial is also frivolous. Since these were not criminal proceedings, the Sixth Amendment is inapposite, and would not in any event guarantee a jury trial where less than a six-month sentence resulted. *Cheff* v. *Schnackenberg,* 384 U.S. 373. The Seventh Amendment, of course, guarantees a jury in civil trials only in suits

at common law, and thus a jury is not required in suits in equity for an injunction,[3] or in civil coercive contempt proceedings. *Shillitani* v. *United States*, 384 U.S. 364, 365. Moreover, in Section 1101 of Title XI of the Act, 42 U.S.C. 2000h, Congress expressly declined to create a right to trial by jury in civil contempt proceedings to secure compliance with the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

GARY J. GREENBERG,
Attorney.

APRIL 1968.

[3] See *United States* v. *Louisiana*, 339 U.S. 699, 706; *Adams* v. *Fazzio Real Estate Co.*, 268 F. Supp. 630, 640 (E.D. La.) (citing the legislative history which shows that Congress did not intend there to be jury trials in suits brought under Title II).

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